



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA FAX (614-221-0721) and CERTIFIED MAIL
RETURN RECEIPT REQUESTED

JAN 27 2012

Chris Redfern, Chairman
Ohio Democratic Party
340 Fulton Street
Columbus, OH 43215

RE: MUR 6357
American Crossroads and
Margee Clancy, in her official
capacity as treasurer

Dear Mr. Redfern:

On January 24, 2012, the Federal Election Commission considered the allegations contained in your complaint dated August 25, 2011, but was equally divided on whether to find reason to believe American Crossroads and Margee Clancy, in her official capacity as treasurer, violated the Federal Election Campaign Act of 1971, as amended. In addition, the Commission found that on the basis of the information provided in your complaint, and information provided by the respondents, there is no reason to believe the Portman for Senate Committee and Natalie K. Baur, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f). Accordingly, on January 24, 2012, the Commission closed the file in this matter.

A Statement of Reasons providing a basis for the Commission's decision with respect to American Crossroads will follow. The Factual and Legal Analysis, which more fully explains the Commission's finding with respect to the Portman for Senate Committee, is enclosed.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

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The Federal Election Campaign Act allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8). If you have any questions, please contact Kasey Morgenheim, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Mark Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Portman for Senate Committee and MUR 6357
Natalie K. Baur, in her official
capacity as treasurer

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by
Chris Redfern. *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

This matter concerns allegations that the Portman for Senate Committee ("Portman
Committee" or "Committee"), Rob Portman's principal campaign committee for U.S. Senate in
Ohio in 2010, accepted an excessive contribution from American Crossroads, an independent
expenditure-only political committee registered with the Commission, when American
Crossroads spent \$454,341.80 to create and air a television advertisement that allegedly
republished Portman Committee campaign materials.

A. Background

On August 17, 2010, American Crossroads began airing a thirty second television
advertisement entitled "Jobs for Ohio," which promotes Rob Portman, a candidate for Senate in
Ohio. *See* <http://www.youtube.com/watch?v=Cy3xKL4vlc8>. The voice-over narration of the
advertisement praises Portman's efforts to create jobs in Ohio and exhorts the listener to "Vote
Rob Portman." The advertisement contains several short segments of video footage of Rob
Portman talking to individuals or groups, walking in a parade with his family, eating with a
group at a picnic table, and speaking at a podium holding up a brochure entitled "Portman Plan
to Create Ohio Jobs." *Id.* The video footage of Portman comprises approximately ten to fifteen

seconds of the thirty second advertisement. American Crossroads filed an independent expenditure report on August 17, 2010 indicating that the group spent a total of \$454,341.80 on the "Jobs for Ohio" advertisement, including \$14,341.80 for production costs and \$440,000.00 for television placement.

B. Excessive In-Kind Contribution Allegation

The complaint alleges that American Crossroads made, and the Portman Committee accepted, an excessive in-kind contribution because the American Crossroads spent \$454,341.80 to fund a television advertisement that included brief republished segments of several different Portman Committee campaign materials. *See* 2 U.S.C. § 441a(a) and 11 C.F.R. § 109.23(a); *see also* MUR 5743 (Betty Sutton for Congress). Complaint at 5. The complaint claims that almost all of the video footage from the "Jobs for Ohio" advertisement was taken from a campaign video produced, created, and distributed by the Portman Committee. *See* <http://www.youtube.com/watch?v=10r6Y6cmoi4>. Complaint at 4.

The Portman Committee contends that the facts alleged in the complaint do not constitute a violation of the Act. Portman Committee Response at 1. The response states that the video at issue is publicly available on YouTube and that no one at the Committee had any contact with American Crossroads about this or any other communication. *Id.* The response argues that under the Commission's regulations and precedent, a campaign cannot be held liable if a third party republishes campaign material that is publicly available on the internet. *Id.*

American Crossroads also asserts that the advertisement was produced independently of the Portman Committee and that American Crossroads personnel had no contact with the Portman Committee. American Crossroads contends that no material in the advertisement was obtained directly from the Portman campaign, and that all content in the advertisement not

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1 produced by American Crossroads was obtained through public domain internet sources,
2 including YouTube.

3 **III. ANALYSIS**

4 The Commission finds no reason to believe that the Portman for Senate Committee and
5 Natalie K. Baur, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f) by accepting an
6 excessive in-kind contribution from American Crossroads in the form of a coordinated
7 communication.

8 As the recipient committee of an alleged republication benefit, the Portman Committee,
9 which prepared the original video footage of the candidate, does not receive or accept an in-kind
10 contribution, and is not required to report an expenditure, unless the dissemination, distribution,
11 or republication of campaign materials is a coordinated communication. 11 C.F.R. § 109.23(a).

12 Under the Act, an expenditure made by any person “in cooperation, consultation, or concert,
13 with, or at the request or suggestion of, a candidate, his authorized political committees or their
14 agents” constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is
15 coordinated with a candidate, a candidate’s authorized committee, or agent of the candidate or
16 committee when the communication satisfies the three-pronged test set forth in 11 C.F.R.

17 § 109.21(a): (1) the communication is paid for by a person other than that candidate or
18 authorized committee; (2) the communication satisfies at least one of the content standards set
19 forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct
20 standards set forth in 11 C.F.R. § 109.21(d). The Commission’s regulations at 11 C.F.R. § 109.21
21 provide that coordinated communications constitute in-kind contributions from the party paying
22 for such communications to the candidate, the candidate’s authorized committee, or the political
23 party committee which coordinates the communication. As an in-kind contribution, the costs of

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coordinated communications must not exceed a political committee's applicable contribution limits. *See* 2 U.S.C. § 441a.

A. Payment

The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied. American Crossroads filed an independent expenditure report on August 17, 2010 disclosing that the group spent a total of \$434,341.80 on the "Jobs for Ohio" advertisement. The advertisement's disclaimer also states that American Crossroads paid for it.

B. Content

The content prong of the coordination regulation is also satisfied. The content prong is satisfied if a communication meets at least one of the following content standards: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office; or (4) a public communication, in relevant part, that refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the candidate's primary election. *See* 11 C.F.R. § 109.21(c).

The "Jobs for Ohio" advertisement identified Senate candidate Rob Portman and was broadcast on television in the State of Ohio on August 17, 2010, 77 days before the November 2, 2010 election. Thus, it qualifies as a public communication referring to a clearly identified candidate distributed within 90 days of an election.

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C. Conduct

The Commission's regulations set forth the following six types of conduct between the payor and the committee, whether or not there is agreement or formal collaboration, that satisfy the conduct prong of the coordination standard: (1) the communication "is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee," or if the communication is created, produced, or distributed at the suggestion of the payor and the candidate or authorized committee assents to the suggestion; (2) the candidate, his or her committee, or their agent is materially involved in the content, intended audience, means or mode of communication, the specific media outlet used, or the timing or frequency of the communication; (3) the communication is created, produced, or distributed after at least one substantial discussion about the communication between the person paying for the communication, or that person's employees or agents, and the candidate or his or her authorized committee, his or her opponent or opponent's authorized committee, a political party committee, or any of their agents;¹ (4) a common vendor uses or conveys information material to the creation, production or distribution of the communication; (5) a former employee or independent contractor uses or conveys information material to the creation, production or distribution of the communication; and (6) the dissemination, distribution, or republication of campaign materials. 11 C.F.R. § 109.21(d)(1)-(6).

A communication that republishes campaign materials prepared by a candidate's authorized committee is an expenditure and a contribution for purposes of contribution

¹ A "substantial discussion" includes informing the payor about the campaign's plans, projects, activities, or needs, or providing the payor with information material to the communication. See 11 C.F.R. § 109.21(d)(3).

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1 limitations and reporting responsibilities of the person making the expenditure, regardless of
2 whether the communication was coordinated with the authorized committee. *See* 2 U.S.C.
3 § 441a(a)(7)(B)(iii) and 11 C.F.R. § 109.23. However, in considering whether the recipient
4 committee of an alleged republication benefit receives or accepts an in-kind contribution in the
5 coordination context, the republication conduct standard applies only if there was a request or
6 suggestion, material involvement, or substantial discussion that took place after the original
7 preparation of the campaign materials that are disseminated, distributed, or republished. *See*
8 11 C.F.R. § 109.21(d)(6).

9 The material involvement and substantial discussion standards of the conduct prong are
10 not satisfied “if the information material to the creation, production, or distribution of the
11 communication was obtained from a publicly available source.” 11 C.F.R. § 109.21(d)(2) and
12 (3). *See also* Explanation and Justification, *Coordinated Communications*, 71 Fed. Reg. 33190,
13 33205 (June 8, 2006) (explaining that “[u]nder the new safe harbor, a communication created
14 with information found . . . on a candidate’s or political party’s Web site, or learned from a
15 public campaign speech . . . is not a coordinated communication”). However, to qualify for the
16 safe harbor for the use of publicly available information, the person or organization paying for
17 the communication “bears the burden of showing that the information used in creating,
18 producing or distributing the communication was obtained from a publicly available source.” *Id.*
19 As one way of meeting this burden, the person or organization paying for the communication
20 may demonstrate that the information used in the communication was obtained from a publicly
21 available website. *Id.*

22 American Crossroads has demonstrated that the video footage of Rob Portman used in its
23 advertisement was obtained from publicly available sources, specifically videos on the YouTube

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1 website that appear to have been posted by Rob Portman or the Portman Committee, and
2 therefore the advertisement qualifies for the safe harbor for use of publicly available information.
3 See <http://www.youtube.com/watch?v=3Xs3j8gjbo8> and
4 <http://www.youtube.com/watch?v=10r6Y6cmoi4>. Both American Crossroads and the Portman
5 Committee have also specifically denied that representatives of the organizations had any contact
6 regarding the "Jobs for Ohio" advertisement and there is no information to suggest otherwise.
7 Thus, it does not appear that the request or suggestion, material involvement, or substantial
8 discussion conduct prongs are satisfied. The available information also does not indicate that the
9 common vendor or former employee conduct standards are satisfied. See
10 11 C.F.R. § 109.21(d)(4)-(5). There is no allegation in the complaint, nor did the Commission
11 find any available information suggesting, that American Crossroads and the Portman
12 Committee shared a common vendor or that a former Portman Committee employee was
13 working with American Crossroads on its advertisement. Finally, the advertisement was not
14 republication in the coordination context because there is no available information suggesting
15 that there was a request or suggestion, material involvement, or substantial discussion that took
16 place between representatives of American Crossroads and the Portman Committee after the
17 original preparation of the campaign materials by the Committee.

18 In the absence of information that respondents satisfied any of the tests for the conduct
19 prong contained in 11 C.F.R. § 109.21(d)(1)-(6), the Commission finds no reason to believe that
20 the Portman for Senate Committee and Natalie K. Baur, in her official capacity as treasurer,
21 violated 2 U.S.C. § 441a(f) by accepting an excessive in-kind contribution from American
22 Crossroads in the form of a coordinated communication.

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